No. 24123-8-III

IN THE
COURT OF APPEALS, DIVISION III,
OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,
Respondent,

v.

VIRGIL R. MONTGOMERY,
Appellant.

APPELLANT'S BRIEF

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A. ASSIGNMENTS OF ERROR

Assignments of Error

1. The trial court erred in giving the issue of the defendant's intent to manufacture methamphetamine to the jury when the evidence was insufficient to convict as a matter of law.

2. The trial court erred in permitting the State's witnesses to give their opinions as to the ultimate issue in this case, the defendant's intent.

3. The trial court erred in permitting the prosecutor to create a negative inference regarding the defendant's exercise of his Miranda rights.

4. The trial court erred in giving *Washington Pattern Instruction – Criminal* (WPIC) 5.20, the "missing witness" instruction, to the jury on behalf of the State.

5. The trial court erred in allowing the State to engage in argument regarding the absence of certain witnesses from the defendant's case.

6. The superior court erred in allowing the prosecutor repeatedly to shift the burden of proof in his questioning and closing arguments.

7. The trial court erred in failing to consider the First-Time Offender Waiver sentencing option of RCW 9.94A.650.

8. The trial court erred in allowing the defendant to be tried and sentenced

in violation of his constitutional rights to counsel.

Issues Pertaining to Assignments of Error

1. When the evidence showed merely that the defendant and a companion, shopping both together and independently, purchased various items in several stores, including cold medication, hydrogen peroxide, matches and acetone, was the evidence insufficient as a matter of law to prove the defendant intended to manufacture methamphetamine? See Assignment of Error (EOA) No. 1.

2. Did the trial court err in allowing three State's witnesses to give their opinions as to the ultimate issue in this case — the defendant's intent to make methamphetamine — when, given the lack of other evidence of intent, such testimony likely resulted in the conviction? See EOA No. 2.

3. When the State's rebuttal case was entirely for the purpose of showing that the defendant had not spoken to the police regarding his explanation for his purchases, did the trial court err in permitting the State to create a negative inference from the defendant's exercise of his Miranda rights? See EOA No. 3.

4. Did the trial court err in granting the State's request for a "missing witness" instruction as to the failure of the defendant's grandson and landlord to testify on his behalf and in allowing the State to argue about their absence in closing arguments, when such witnesses were either unimportant and cumulative

or no evidence of their availability or corroborative ability was adduced at trial? See EOA Nos. 4 & 5.

5. Did the trial court erroneously shift the burden of proof to the defendant in giving the inappropriate missing witness instruction and permitting the State to a) create a negative inference from the defendant's failure to speak to the police, b) question the defendant about the absence of his son and grandson, c) question the defendant's daughter about her failure to come forward to exonerate her father, and d) argue in closing arguments that the defendant was not credible because his testimony was not sufficiently corroborated? See EOA No. 6.

6. When the First-Time Offender Waiver sentencing option of RCW 9.94A.650 applies to first-time offenders who have not been convicted of certain enumerated crimes, none applicable here, and the defendant had no prior felonies, did the trial court err in failing to consider this statute in sentencing the defendant? See EOA No. 7.

7. Was defendant's trial counsel ineffective in failing to object to the State's witnesses' testimony as to their opinion of the ultimate issue in the case and in failing to inform the court of the applicability of RCW 9.94A.650? See EOA Nos. 2, 7 & 8.

8. If none of the individual trial errors requires reversal, does the

cumulative error doctrine nevertheless mandate reversal in this case, as the errors deprived the defendant of a fair trial? See EOA Nos. 2-8.

Standards of Review

Issue 1: The test for determining the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the State, any rational trier of fact would have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted).

Issues 2-6 & 8: Appellate courts review questions of law on a *de novo* basis. *See State v. Bright*, 129 Wn.2d 257, 265, 916 P.2d 922 (1996) (citation omitted) (question of law subject to *de novo* review).

Issue 7: This Court reviews a claim of ineffective assistance of counsel *de novo*. *State v. S.M.*, 100 Wn. App. 401, 409, 996 P.2d 1111 (2000).

B. STATEMENT OF THE CASE

Procedural History

The State charged the defendant in this case, Virgil R. Montgomery, and a codefendant, Joyce Biby, with possession of ephedrine or pseudoephedrine on June 23, 2004, with intent to manufacture methamphetamine, in violation of RCW 69.50.440. CP at 1.

Mr. Montgomery exercised his right to a jury trial, the Honorable Michael P. Price presiding. He was convicted after trial. CP at 28. Under the Sentencing Reform Act (SRA), Mr. Montgomery had an offender score of 0 and the crime had a seriousness level of 3. CP at 31. Thus, his sentencing range was 51 to 68 months. CP at 31. The Court imposed a 51 month sentence. CP at 35. The court waived all fees except the $500 victim assessment fee. CP at 32-33; RP at 280.[1]

Although Mr. Montgomery had no prior felonies, the court did not consider the First-Time Offender Waiver sentencing option of RCW 9.94A.650. See RP at 270-92.

This appeal followed.

Substantive Facts

Evidence of the Charged Crime

Two detectives conducting surveillance in a Target store in Spokane, Washington, observed 60-year-old Mr. Montgomery and 63-year-old Joyce Biby enter the store and go directly to the aisle where cold medication was sold. RP at 32-33, 81, 112-13, 118. Mr. Montgomery pointed "at particular brands of cold pills." RP at 33, 113. He selected two boxes and went toward the check out counters. RP at 34, 113. After checking out, Mr. Montgomery did something on

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1 Three separately-paginated volumes of transcripts were filed in this case. In this Brief, RP refers to the transcript of the trial and sentencing.

the computer at the front of the store while Ms. Biby finished up. RP at 35.

Ms. Biby left the cold medication aisle, got a cart, and did some shopping. RP at 113, 35. She then returned to the cold medication aisle and selected two boxes of the kind of cold medicine Mr. Montgomery had pointed at. RP at 34, 113. She paid for her items separately from Mr. Montgomery. RP at 113, 35.

The detectives found this behavior suspicious. RP at 34, 36, 113-14. In the course of doing "pretty close to a hundred" methamphetamine investigations, one officer had repeatedly observed groups of people entering stores, buying the same pills but trying not to appear associated with each other. RP at 34, 35-36, 40. Thus, he believed Mr. Montgomery's and Ms. Biby's behavior was consistent with people attempting to hide their association. RP at 102. At the same time, the detective admitted the actions he observed could also have had an innocent explanation. RP at 36.

The other detective described "specific behaviors" of individuals buying chemicals needed to make methamphetamine. RP at 111. These actions include entering a store in a group, going in different directions, picking out the chemicals at different times, going to different checkout counters, going to different clerks, leaving the store at different times. Sometimes people go to the parking lot and change clothes before returning to buy more chemicals. People also remove cold

pills from packaging immediately and throw the packaging away, to prevent apprehension with extra boxes of cold medicine. RP at 111.

The detectives described the "red phosphorus" method of manufacturing methamphetamine. The method requires cold pills containing pseudoephedrine hydrochloride; red phosphorus from a source such as matchbook striker plates or road flares; organic and inorganic solvents, such as acetone, denatured alcohol, Coleman fuel, paint thinner, "Heat" or toluene; tincture of iodine, hydrogen peroxide, Red Devil Lye, and muriatic acid. RP at 29-31, 54, 109. The cold pills would need to be purchased for each new batch. RP at 56. On the other hand, denatured alcohol, tincture of iodine and acetone would not be used up in making a batch. RP at 55-57.

Mr. Montgomery testified that he lives with his son and grandson just across the Washington border, in Old Town, Idaho. RP at 167, 168. Although an ordained minister, he has ceased working to care for his son who was debilitated by a stroke. RP at 168.

Mr. Montgomery met Ms. Biby about fifteen years ago, but lost touch until about a year prior to their trip to Spokane. RP at 168-69. They renewed acquaintance when they met as volunteers at the Old Town Food Bank. They have never dated. RP at 169. Ms. Biby lives on the Newport, Washington side of

the Old Town/Newport community. RP at 173.

On the day in question, Mr. Montgomery drove Ms. Biby to Spokane for a mental health appointment, using Ms. Biby's son-in-law's car. RP at 169-71. He drove because Ms. Biby did not feel able to drive. In Spokane, Mr. Montgomery waited in the car while Ms. Biby went in to her appointment. RP at 171. When Ms. Biby left her appointment, she was crying and upset. RP at 172. They decided to go shopping to calm her down. RP at 171. Mr. Montgomery sometimes shops in Spokane for the better selection and prices than are available where he lives. RP at 173-74.

After Mr. Montgomery and Ms. Biby left the Target store, the detectives observed them get into a vehicle with Colorado license plates and drive to a Dollar Store. RP at 114. There, Mr. Montgomery and Ms. Biby did some shopping, "picking up things, putting them back," purchasing dollar reading glasses. RP at 36, 114. This behavior aroused no suspicions. See RP at 114.

The detectives then followed the two shoppers to an adjacent grocery store. RP at 36-37, 114. Ms. Biby got a cart and began shopping. RP at 37. She purchased, among other items that did not raise the detective's suspicions, three boxes of matches, each box containing fifty books of matches. RP at 37-38. The officers deemed the matches suspicious as they are a common source for red

phosphorus. RP at 38.

While Ms. Biby was shopping, Mr. Montgomery walked directly to the pharmacy area of the store and obtained a redemption coupon for the purchase of cold pills. RP at 37. He went to the courtesy booth and purchased a box of Sudafed-24, for a total of three boxes of cold pills he purchased that day. RP at 38, see RP at 177. The Sudafed was a different brand from the others, of a different strength, and contained a different number of pills. RP at 86, 137.

The detectives next followed the pair to a K-mart store. RP 38. Mr. Montgomery and Ms. Biby shopped throughout the store, in particular looking at the solvents in the paint section, but did not buy anything. RP at 115, 38. Failing to make any purchases was consistent with one detective's theory of the case, as he could not remember anyone buying ingredients for making methamphetamine at a K-mart before. RP at 39. However, the detective acknowledged that the store likely sold some of the necessary ingredients. RP at 88.

The detectives followed Mr. Montgomery and Ms. Biby to a Wal-mart store. RP at 39, 115. Mr. Montgomery and the woman again apparently shopped throughout the store. A detective observed them come together to the checkout lanes and separate for checking out. Mr. Montgomery bought a gallon of acetone and Ms. Biby bought two cans of denatured alcohol. RP at 39.

Based on these purchases, one of the detectives was asked for and provided his opinion as to the ultimate issue in the case, "And what were [your] conclusions?" "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine." RP at 40. The other detective, when questioned as to why the shoppers' vehicle was not stopped sooner, stated his belief that Mr. Montgomery intended to make meth: "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the actual lab location." RP at 116.

The detectives then followed Mr. Montgomery and Ms. Biby to another Target store. RP at 41, 117. The two entered the store and walked directly to the cold medication aisle. Mr. Montgomery pointed to "a specific spot in the aisle," and walked away. The woman selected two boxes of cold medicine and proceeded to check out. Mr. Montgomery chose a large bottle of hydrogen peroxide and proceeded to a different check out line. RP at 117.

During their surveillance, the detectives had not observed Mr. Montgomery and Ms. Biby exchange money, with the exception of Mr. Montgomery reimbursing her for the dollar reading glasses. RP at 86, 177.

The two left the store and drove off, passing, without stopping, two stores that sell tincture of iodine. RP at 41-42 & 93-94, 122. When it became apparent

that the shoppers had no further local stops to make, the detectives arranged for a patrol car to stop their car. RP at 42.

One detective arrested Mr. Montgomery, the driver of the vehicle, read him his Miranda rights, and searched the vehicle. RP at 43-44, 91. The vehicle belonged to a relative of Ms. Biby. RP at 46. From the vehicle, the detectives recovered the items they had seen purchased that day. RP at 44-45. In addition, they recovered five additional boxes of matches, a crack pipe from under the passenger seat, and nine store receipts dated the day of the arrest. RP at 44-45. Absolutely no evidence connected the crack pipe to either Mr. Montgomery or Ms. Biby. See RP at 45-46, 60-61, 92, 183-84.

One detective noted that the items recovered were not sufficient to make methamphetamine. Tincture of iodine, Red Devil Lye, and muriatic or sulfuric acid were also necessary. RP at 54 & 95-96; but see RP at 147, 153-54, 156 (forensic chemist adds nonpolar solvent to list of missing ingredients). However, based on his training and experience, in terms of additional items required to make meth, he believed they were "really close." RP at 54. Yet, without any one of the missing ingredients, a person would likely not be able to manufacture the drug. RP at 96-97.

The detective thought the amount of methamphetamine that could be made

from all the cold medicine purchases was "small." RP at 71. He testified that he "typically" sees such small amounts of meth made in labs because many of the labs he has investigated are conducted for an individual's own personal use. RP at 71-72. He also believes that meth manufacturers come to Spokane for their purchases to safeguard their identities. RP at 74.

The detectives did not seek a search warrant to determine whether Mr. Montgomery or his companion were operating a methamphetamine lab because they knew they could not get one. RP at 100-01, 133-34. To obtain a warrant, the officers would have had to have seen Mr. Montgomery or Ms. Biby carry the precursor ingredients into a specific location. RP at 133-34. Thus, the evidence before the jury did not establish probable cause of the existence of a meth lab. RP at 133-34.

Additionally, the detectives did not recover the components of a meth lab in the searched vehicle. RP at 99-100, 132, 134, 138.

The forensic chemist also described the ingredients required in the red phosphorus method of manufacturing methamphetamine: Red phosphorus; iodine, typically obtained from tincture of iodine; cold pills containing pseudoephedrine; a polar solvent such as denatured or isopropyl alcohol; and a nonpolar solvent such as toluene, mineral spirits or Coleman fuel. RP at 142.

When he looked at the photographs of the items recovered from the vehicle Mr. Montgomery was driving, he confirmed that the matches could be used to obtain red phosphorus, the alcohol could be used as a polar solvent, the hydrogen peroxide could by used to remove iodine from solution, and the acetone could be used in several areas, including loosening the glue from matchbooks and cleaning up the final product. The chemist noted that the quantities recovered were consistent with the manufacture of methamphetamine. RP at 146. He would not have been surprised to see these chemicals in a meth lab. RP at 147. He additionally confirmed that these products all had innocuous uses as well. RP at 145.

The chemist also observed that to make the drug, additional items would be required, including a source of iodine, a nonpolar solvent, a source of hydrochloric acid, and a chemical like Red Devil Lye. RP at 147, 153-54, 156.

The total amount of pseudoephedrine contained in the cold pills purchased by both Mr. Montgomery and the woman was about 11.28 grams.[2] RP at 147-48 & 157. From 11.28 grams of pseudoephedrine, roughly half that amount of methamphetamine, or 5.64 grams, could be produced. See RP at 148. The

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2 Calculation based on one box of 48 pills, containing 60 milligrams of the active ingredient; five boxes of 24 pills each, in the same strength; and one box of five pills each containing 240 milligrams of pseudoephedrine; but see RP at 138 where detective stated that six of the boxes contained 24 pills and one contained five.

amount of methamphetamine attainable from Mr. Montgomery's three boxes of pills would have been only about 2 grams.[3]

The chemist also gave his opinion as to the ultimate question in the trial, whether Mr. Montgomery had the intent to manufacture methamphetamine. All the items recovered from both Mr. Montgomery and the woman, taken together, would "lead [him] toward [the conclusion that] this pseudoephedrine is possessed with intent." RP at 160. However, the items Mr. Montgomery alone purchased, three boxes of cold medicine, acetone and hydrogen peroxide, were not sufficient for the chemist to conclude that Mr. Montgomery intended to make meth: "[W]ouldn't be able to come to a conclusion based on that." RP at 161.

Mr. Montgomery explained that he and his son and grandson live in a rented trailer which requires certain repairs. RP at 167. He had an agreement with the owner that he would "pay the space rent and fix the trailer up." RP at 167. While in K-mart, he looked at solvents because he needed acetone to assist him in removing old tiles in the trailer. The acetone breaks down the glue. RP at 179. It was for this purpose that he purchased the chemical. RP at 180.

On the day in question, he and Ms. Biby first went to URM. RP at 172.

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3 Calculation based on two boxes of pseudoephedrine containing 24 tablets of 60 milligram strength (2880 milligram pseudoephedrine total) plus one box of five tablets at 240 milligram strength (1200 mg pseudoephedrine), for a total of 4080 milligrams pseudoephedrine, divided by two for the 50 per cent recovery rate.

There, Mr. Montgomery bought matches for his wood heater and his son's cigarettes. RP at 173. He and Ms. Biby purchased other assorted items. RP at 172-74. All their shopping was independent of each other and independently paid for. RP at 172, 175, 181. He did not necessarily know what Ms. Biby purchased or why she purchased what she did. RP at 180-81.

At the first Target store, Mr. Montgomery checked out before Ms. Biby, but waited for her, because he wanted to give her time to look around on her own and settle down. RP at 176.

At the grocery store, he bought a different cold medication than the one he had purchased at Target. The second medication, Sudafed-24, was for his son, who takes three different medications and is susceptible to allergic reactions from drug interactions. The Sudafed-24 does not cause problems for his son. It was not available at the Target. RP at 186. He purchased the Target brand medication for himself. RP at 177, 184.

Mr. Montgomery bought the hydrogen peroxide for the family's dog, who had badly cut her leg. RP at 182.

Evidence Regarding the Trial Errors

In his cross examination of Mr. Montgomery, the State wanted to know why Mr. Montgomery's son and grandson did not corroborate his testimony:

Q: Did – and you said it's your son's dog?
A: Maggie was mine.
Q: Okay. But you live with your son?
A: Yes, and grandson.
Q: And the dog, when it was alive, lived with you?
A: Yes.
Q: So they knew that the dog had been injured?
A: Yes.
Q: And they're not here today?
A: No, they're not.
Q: And your son has to use 24-hour pseudoephedrine rather than the regular stuff because of his medical problems?
A: Yes.
Q: And he knew you were going to be in trial today?
A: Yes, he did.
Q: And you've discussed the case with him?
A: Very little.
Q: He's not here today?

RP at 187-188.

At that point, Mr. Montgomery's attorney objected, on the grounds of burden shifting. The court overruled the objection. RP at 188. Mr. Montgomery explained that he did not believe his son was capable of understanding what was happening. RP at 189. The prosecutor continued with his questioning:

Q: Would your grandson [have understood what was happening]?
A: He's in school.
Q: And you had tile, as you said, you had to replace?
A: Yes.
Q: And they live with you, so they would know about that?
A: Yes.
Q: And they would know about purchasing the acetone in order to use if for the tiles?

A: Yes.
Q: And again, they're not here today?
A: Again, they're not here.

RP at 189.

On redirect, Mr. Montgomery explained that his son was catatonic half the time, that he could not carry on a conversation with him, that he rarely leaves the house. RP at 190. He also averred that his 14-year-old grandson's most important job was to get his education. RP at 191.

On recross, the State returned to the grandson's absence from the trial. Mr. Montgomery renewed his objection to the line of questioning. The court permitted the questions. RP at 191.

Q: Okay. You're on trial, right?
A: Yes. That's true.
Q: And potentially there could be serious consequences, correct?
A: Yes, there could.
Q: So his most important job is to be in school today?
A: My grandson is, yes.
Q: He could corroborate everything you said?

RP at 192.

In response to the State's questioning, Mr. Montgomery asked his adult daughter to take the witness stand. The defense had not planned to call her and she had been present in the courtroom during trial. RP at 193. The daughter, Christine Nelson, was in law enforcement training. RP at 199-200. She verified

that the dog, Maggie, had sliced her foot on the tin skirting of the trailer where Mr. Montgomery lives with his son and grandson. RP at 195-96. Ms. Nelson was present when Mr. Montgomery tried to stitch up the dog's wound. RP at 196.

Ms. Nelson also confirmed that her brother had had a stroke, was a diagnosed paranoid schizophrenic and was a difficult person for the family to handle. It is "challenging" to get him out of the house, and he does not like to be around strangers. RP at 197. She further noted that her nephew was in school. RP at 197-98.

On cross examination, the State observed that Ms. Nelson had not come forward to tell her side of the story: "And you never came forward to tell anybody your side of the story?" RP at 198. The court sustained Mr. Montgomery's objection. RP at 199. Seconds later, the State repeated its observation. "But you've – but you never felt compelled to come forward before this day?" RP at 199. Again the court sustained the objection. RP at 199.

When the State determined to put a detective back on the stand for rebuttal, Mr. Montgomery objected, given the limited nature of the defense case. RP at 201-02. The State offered a proffer of the detective's testimony, which would be that nobody had ever contacted him with any alternative explanation as to why Mr. Montgomery had purchased hydrogen peroxide. RP at 203. Mr.

Montgomery continued to object on grounds of burden-shifting and the fact that Mr. Montgomery was silent in the exercise of his rights: "My client exercised his rights. . . . He chose not to talk to the officers after they read him his rights, and on the stand, he explained what the reason for it was." RP at 203. The court allowed the questioning, with a standing objection to it. RP at 204-05.

The detective testified that no one had ever approached him with an alternative explanation for what Mr. Montgomery purchased. RP at 205. On cross, the detective agreed that it was "not terribly common" for a defendant, once he has a lawyer, to approach a detective with an alternate explanation prior to trial. RP at 206. The detective said that he did contact the defendant the day after his arrest, but did not speak to him about the case as the defendant was "in custody." RP at 206.

The prosecutor took the discussion a step further on redirect, asking "And why didn't you ask him any questions?" The detective answered, "It was already made clear to me from him from the previous day he didn't want to talk to me." RP at 207.

In the discussion regarding jury instructions, the State requested WPIC 5.20, also known as the missing witness instruction. RP at 210-12. It believed the instruction was warranted due to the missing grandson, having acknowledged that

the son could not have been present. In addition, it now argued for the first time that the landlord was also missing. RP at 211.

Mr. Montgomery objected to the inclusion of the instruction. RP at 213-16. He reiterated his belief that the grandson's job was to be in school. He also stated that additional testimony would have been cumulative. RP at 214. In particular, he objected to the burden-shifting result in this case. RP at 216. The State argued that the instruction was required to ensure the State's right to a fair trial. RP at 216-17. The judge decided to go forward with the jury instruction. RP at 220-21. He gave it in full:

> If a party does not produce the testimony of a witness who is within the control of or peculiarly available to that party and is (sic) a matter of reasonable probability, it appears naturally in the interest of the party to produce the witness, and if the party fails to satisfactorily explain why it has not called the witness, you may infer that the testimony that the witness would have given would have been unfavorable to the party, if you believe such inference is warranted under all the circumstances of the case.

RP at 227. Because the State did not bring up the issue of the landlord until after the close of evidence, no evidence, other than Mr. Montgomery's mention of the existence of a landlord, had been introduced regarding the landlord's presence or absence. For the same reasons, Mr. Montgomery had not been given the opportunity to explain why the landlord was not called as a witness. See RP.

In his closing argument, the prosecutor made numerous references to Mr.

Montgomery's failure to produce defense witnesses. RP at 237, 239, 240, 241-42, 245, 264. The prosecutor also acknowledged that the entire burden of proof rests with the State. RP at 241, 264. The defense did not object to the prosecutor's closing remarks. See RP at 230-47, 259-65.

The prosecutor focused on two "missing" witnesses, Mr. Montgomery's 14-year-old grandson and his landlord. He said the following about the "missing" grandson:

> So when you're trying to decide whether or not something is reasonable, think about who didn't testify. Who could have corroborated those innocent uses. Because his daughter only talked about the dog. Didn't talk about the wood stove. Didn't talk about anything else, the adhesive or anything like that. All she testified to was the dog. Who could have testified to those other things? They say the primary purpose of a 14-year-old was to be in school. Does that jive with your common experience?
>
> I have kids, and if I were in trouble, if I were on trial, and my kid told me – my kid is quite a bit older than that – said, well, gee, dad, I got to work that day, what do you think about that? Is that reasonable to you? Is that a reasonable explanation? If my son were on trial and I knew something, if I could corroborate something for him, do you think you could keep me away from a courtroom? Keep you away from a courtroom if you had testimony that would help him? Think about that. Read that instruction.

RP at 239. The prosecutor shortly returned to the topic:

> Now, I just said you couldn't keep me away, couldn't keep your kids away or you away if a family member was in trouble or a friend. The reason is, even if there were no punishment whatsoever, you just wouldn't let that happen to a friend or a family member.

RP at 240.

The prosecutor returned to the issue of the grandson in his rebuttal argument, "They tell you they didn't want to burden people. Think about that. The 14-year-old son, all the other things, think about it. Is it consistent with your common experience? Is it reasonable? And it's not." RP at 264.

The prosecutor said the following about the "missing" landlord: "But he provides explanations for every item that he bought. He talks about the adhesive on the tiles, so he needed the acetone. He talks about a landlord. Where's the landlord? Where's the landlord to corroborate what happened?" RP at 237. He later returned to the topic:

> And ask yourself, where's the landlord? Where's the landlord that could talk about this adhesive. He said that there was a small amount that had been used up, so he needed to buy a whole bunch more. Think about that. That person is not here today. It is uncorroborated testimony.

RP at 240. He returned to the topic again:

> [The defendant's testimony] just doesn't square. It's not credible. It's not corroborated. And normally you don't have to corroborate anything if you're a defendant. But if you do decide to give an explanation, if you do decide to say, well, my landlord had some acetone, or I'm getting it for my son.

RP at 241-42.

The prosecutor also spoke of missing witnesses and failure to corroborate

in terms of reasonable doubt:

> Also, a reasonable doubt can come from the evidence, and it can come from the lack of evidence. This is where the corroboration comes from. It's a lack of corroboration, a lack of evidence. There is no reasonable doubt in this case at all. There are reasons. He's given you reasons, but it is not reasonable doubt.

RP at 242.

The prosecutor returned yet again to the topic, implying again that Mr. Montgomery had testified about his landlord: "I've already talked about whether or not somebody starts talking about other people when they don't produce those people. Think about that. Where are these people? What does it mean that they're not here?" RP at 245.

The Court instructed the jury that Mr. Montgomery was presumed innocent and the State had the burden of proving his guilt beyond a reasonable doubt. RP at 225.

C. ARGUMENT

Point I: The Evidence of Mr. Montgomery's Intent to Manufacture Methamphetamine was Insufficient as a Matter of Law

The evidence at trial was insufficient as a matter of law to prove Mr. Montgomery intended to manufacture methamphetamine. Evidence supports a conviction if, when viewed in the light most favorable to the prosecution, a

rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *State v. Salinas*, 119 Wn.2d 192, 201, 829 P.2d 1068 (1992) (citation omitted). "A claim of insufficiency admits the truth of the State's evidence and all inferences that reasonably can be drawn therefrom." *Id.* Credibility determinations are for the trier of fact and are not subject to review. *State v. Camarillo*, 115 Wn.2d 60, 71, 794 P.2d 850 (1990).

The evidence against Mr. Montgomery was solely his purchasing, in the company of a companion, who made similar purchases, entirely legal products. This situation, where the inference of guilt was founded solely upon an activity most citizens engage in nearly daily – a shopping trip – demands the heightened scrutiny of this Court.

Mr. Montgomery purchased two boxes of Target-brand cold medicine and one box of Sudafed-24. In addition, he purchased a gallon of acetone, a large bottle of hydrogen peroxide and several boxes of matches. The State's forensic chemist testified that the cold medicine, acetone and hydrogen peroxide would not be enough to convince him that Mr. Montgomery intended to use these products to manufacture methamphetamine. RP at 161.

Indeed, as the State's witnesses agreed, all the ingredients purchased by Mr. Montgomery and Ms. Biby together would not have been able to produce

meth. RP at 96-97; RP at 147, 153-54, 156. Although one detective described the purchases as "really close" to having all the necessary ingredients, RP at 54, and the other estimated that the two had purchased 75-80 per cent of the necessary ingredients, RP at 139, in fact, the two had only purchased five of the nine required ingredients. A source of iodine, a chemical similar to Red Devil Lye, muriatic or sulfuric acid, and a nonpolar solvent were missing yet essential to the manufacture of methamphetamine. RP at 54 & 95-96, 147, 153-54, 156.

Thus, it was the detectives' observations and conclusions regarding the shopping trip that provided the main evidence against Mr. Montgomery. Particularly damning in the eyes of the officers was the fact that Mr. Montgomery and Ms. Biby entered several different stores together but split up to do their shopping, chose their purchases apart from each other, and selected different check out lines. See RP at 34, 35-36, 40, 102, 113-14. Yet that behavior is perfectly consistent with Mr. Montgomery's explanation that the two were not acting in concert, but merely independently shopping in the same stores at the same time by virtue of the fact that they were in Spokane together. Consistent with that explanation is the fact that Mr. Montgomery and Ms. Biby did not exchange money during the shopping trip, with the exception of Mr. Montgomery reimbursing Ms. Biby for reading glasses. RP at 86, 177.

Their behavior did not approach the stratagems the second detective cited as common among those purchasing ingredients to make methamphetamine, such as entering a store in a group, going in different directions, leaving the store at different times, changing clothes in the parking lot and returning to buy more chemicals, or immediately popping the cold pills out of their packaging. RP at 111. Instead, the pair entered and left stores together, with Mr. Montgomery even waiting in the front of one store for Ms. Biby to finish. RP at 35. They went together to the cold medicine aisle in two of the stores where they bought cold medicine. RP at 112-13, 117. Twice Mr. Montgomery pointed out a particular brand of cold medicine to Ms. Biby. RP at 33, 113, 117. These actions fail to describe the behavior of people attempting to conceal a crime.

What is more, the detectives offered their opinions as to the inferences to be drawn from Mr. Montgomery's perfectly legal behavior. They believed he bought the cold medicine with the intent to manufacture methamphetamine. RP at 40 & 116. However, their inferences were not reasonable as they were colored by the expectation of illegal behavior. In short, the detectives saw illegal intent because they were looking for illegal intent. Without diminishing the importance of the eradication of methamphetamine, the officers were so focused on fighting the problem that they were in danger of finding a methamphetamine manufacturer

under every bush.[4]

Their every observation was viewed through their lenses as methamphetamine investigators. The lead detective even interpreted Mr. Montgomery's and Ms. Biby's failure to purchase anything at the K-mart through this lens: It was consistent with his view of the pair's intent because he had not known of methamphetamine dealers purchasing precursor ingredients at K-mart before. RP at 39. If not purchasing potentially suspect items is as indicative of illegal intent as purchasing such items, it appears that almost any behavior could justify the detectives' suspicions once they were aroused. Accordingly, their inferences were not reasonable and should not be credited on review.

Notably, all of the State's evidence before the jury — the items recovered from the vehicle, the testimony of the detectives who observed the purchases, and the testimony of the chemist evaluating the purchases — would not have been enough to establish probable cause of the existence of a meth lab. RP at 133-34; *see also* RP at 246 (prosecution's closing: "They couldn't get a search warrant based on the evidence they have. You catch somebody with something they're not supposed to have. That doesn't give you carte blanche to start going through

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4 In Point II, below, Mr. Montgomery argues that the witnesses' opinions as to his intent were inadmissible opinions of his guilt. Without consideration of these opinions, a conviction would not have been possible and the insufficiency of the evidence is even more apparent.

every place they inhabit or every place they control.") When the detectives would not have been able to establish probable cause of the existence of a methamphetamine lab, it is almost self-evident that the evidence was insufficient as a matter of law to support the conviction beyond a reasonable doubt.

Of course, strictly speaking, the State did not need to prove the existence of a meth lab. Nevertheless, its trial theory was that Mr. Montgomery and Ms. Biby were operating a small-scale meth lab. The State maintained that the two purchased ingredients to replace those that had been used up in previous batches of meth. RP at 55-57 (discussion of which ingredients need to be purchased for every batch, which ingredients last for more than one batch). Its theory that Mr. Montgomery was replenishing a lab already in existence is inconsistent with the lack of probable cause for the existence of a meth lab.

This discrepancy can be understood in view of the evidence before the jury, evidence that would not have been permitted to sway a judge approving a warrant and should not have been permitted in this case. As previously noted, the evidence the State offered to establish that Mr. Montgomery intended to manufacture methamphetamine was consistent with both innocent and illegal interpretations. However, the State's witnesses, its detectives and its forensic chemist, offered their opinions as to the ultimate question in the case, Mr.

Montgomery's intent. They stated that they believed he intended to manufacture methamphetamine. RP at 40, 116 & 160.

A judge asked to approve a search warrant, on the other hand, would have had to make an independent evaluation of the evidence, without relying on the detectives' and chemist's representations. *Illinois v. Gates*, 462 U.S. 213, 239, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983) ("Sufficient information must be presented to the magistrate to allow that official to determine probable cause; his action cannot be a mere ratification of the bare conclusions of others."). When an individual's freedom is an interest worthy of even greater protection than the sanctity of the home, the State should not have been permitted to prove its case through its witnesses' opinions as to the ultimate issue at trial.

When there was no unequivocal evidence of an illicit intent, the State failed to prove beyond a reasonable doubt that Mr. Montgomery intended to manufacture methamphetamine and this Court should reverse his conviction. Further, given the utter lack of evidence of guilt, Mr. Montgomery asks this Court to instruct the trial court to dismiss the case. *See State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) (reversing conviction with directions to dismiss when there was a complete failure of proof).

Point II: The State's Witnesses' Opinions as to Mr. Montgomery's Intent Were Inadmissible and Consideration of the Opinions Prejudiced Mr. Montgomery

The trial court erred in permitted the State's witnesses to testify as to their opinions that Mr. Montgomery's intended to manufacture methamphetamine. As the only disputed issue in the case was Mr. Montgomery's intent, this testimony was the same as opining that Mr. Montgomery was guilty. Of course, testimony as to guilt or innocence from either lay or expert witnesses is impermissible. *State v. Easter*, 130 Wn.2d 228, 242, 922 P.2d 1285 (1996) (citations omitted) (holding testimony that defendant was evasive and a "smart drunk" was the same as saying he was guilty). Such testimony invades the exclusive fact-finding province of the jury, *id.*, and abrogates a defendant's due process rights and right to a jury trial. See U.S. Const. amend. XIV; Wash. Const. art. I § 3; U.S. Const. art. III § 2; U.S. Const. amend. VI; Wash. Const. art. I § 21; Wash. Const. art. I § 22. In this case, this impermissible testimony swayed the jury, directly resulting in the conviction.

On direct examination, the lead detective was asked for his "conclusions," based on his "training and experience." RP at 40. He gave this opinion as to Mr. Montgomery's intent: "I felt very strongly that they were, in fact, buying ingredients to manufacture methamphetamine based on what they had purchased, the manner in which they had done it, going from different stores, going to

different checkout lanes. I'd seen those actions several times before." RP at 40. Thus, he was asked for and gave his opinion as to the ultimate issue in the case.

The State sought a similar opinion from the chemist. The State asked whether different portions of the evidence allowed him to reach a "solid opinion" "that that person possessed the pseudoephedrine with the sole intent to manufacture methamphetamine." RP at 159. The chemist's opinion became "a little more solid" when the matches were considered along with the "seven or eight" boxes of pseudoephedrine, hydrogen peroxide and denatured alcohol. RP at 159. Adding in the acetone for consideration, the State asked, "So you said before your opinion was becoming solid. Is it now solid?" The chemist answered affirmatively, "Again, these are all what lead me toward this pseudoephedrine is possessed with intent." RP at 160.

The second detective was not directly asked his opinion as to Mr. Montgomery's guilt. However, in explaining why Mr. Montgomery and Ms. Biby were not arrested after they left the Wal-mart, he said he thought they were guilty: "It's always our hope that if the person buying these chemicals, that are for what we believe to be methamphetamine production, that we can take them back to the

actual lab location." RP at 116.[5]

Thus, the trial court violated Mr. Montgomery's due process rights and right to trial by jury in allowing this impermissible testimony. This error, of a constitutional magnitude, prejudiced Mr. Montgomery. A constitutional error is harmless only if the Court is convinced beyond a reasonable doubt that a reasonable jury would reach the same result absent the error. *Easter*, 130 Wn.2d at 242. The State bears the burden of proving the error harmless. *Id.*

When a constitutional error occurs, a court examines only the untainted evidence to determine if it is so overwhelming that it necessarily leads to a finding of guilt. *See State v. Guloy*, 104 Wn.2d 412, 426, 705 P.2d 1182 (1985). Here, the evidence of Mr. Montgomery's intent to manufacture methamphetamine is so slight, see Point I, above, that without the State's witnesses' opinions that Mr. Montgomery was guilty, the jury could not have convicted him. Thus, the unconstitutional testimony swayed the jury, prejudiced Mr. Montgomery, and requires reversal.

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5 While defense counsel did not object to these particular opinions, he objected to other offers of evidence as to the ultimate question. See RP at 73, 187. Nevertheless, as the impermissible testimony amounted to manifest constitutional error, this Court can reverse without contemporaneous objections. *See State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996); Rule of Appellate Procedure 2.5(a)(3). To the extent counsel's failure to object prevents this Court from reviewing this issue, his failure amounted to ineffective assistance of counsel. See Point VII, below.

Point III: The State Violated Mr. Montgomery's Due Process Rights When it Elicited Testimony Regarding His Post-Miranda Silence, Requiring Reversal.

The State's questioning regarding Mr. Montgomery's failure to come forward with his theory of the case after he had invoked his Miranda rights violated Mr. Montgomery's State and federal due process rights. *Doyle v. Ohio*, 426 U.S. 610, 49 L. Ed. 2d 91, 96 S. Ct. 2240 (1976). This constitutional error, when considered in light of the slight evidence supporting the verdict, requires reversal.

The State wrongfully impeached Mr. Montgomery with his post-Miranda-warnings silence. This type of impeachment has long been held to violate due process. *Doyle*, 426 U.S. 610, 613-14. In *Doyle*, the questioning of two separate defendants was at issue. On cross examination, the prosecution had asked them both several questions about their failure to offer their exculpatory stories to the officer who arrested them. *Doyle*, 426 U.S. 610, 613-14. The Ohio court of appeals found the questioning a fair impeachment technique:

> This was not evidence offered by the state in its case in chief as confession by silence or as substantive evidence of guilt but rather cross examination of a witness as to why he had not told the same story earlier at his first opportunity. We find no error in this. It goes to credibility of the witness.

Doyle, 426 U.S. 610, 616-16.

The U.S. Supreme Court disagreed, holding that once a person is given Miranda warnings, his silence may not be used to impeach him. *Doyle,* 426 U.S. 610, 619. The Washington Supreme Court has taken this rule a step further, observing that a defendant's right to silence can be impermissibly circumvented by questioning an arresting officer, as well as by questioning a defendant himself. *Easter*, 130 Wn.2d at 237 (citation omitted).

In *Easter*, a police officer testified that the defendant was hiding his guilt by looking away and not answering his questions. The officer also labeled the defendant a "smart drunk," meaning he was evasive and silent when interrogated. *Easter*, 130 Wn.2d at 234, 241. In addition, during closing argument, the prosecutor repeatedly labeled the defendant "a smart drunk." *Easter*, 130 Wn.2d at 234. On appeal, the court held that the testimony and argument violated the defendant's right to silence. *Easter*, 130 Wn.2d at 241; *accord State v. Keene*, 86 Wn. App. 589, 938 P.2d 839 (1997) (violation of right to silence when detective testified she told defendant she would turn case over to prosecutor if he could not explain himself; prosecutor asked jury to consider whether failure to contact detective was action of innocent man); *but see State v. Lewis*, 130 Wn.2d 700, 927 P.2d 235 (1996) (no error when officer testified only that he told the defendant to come and talk to him if he were innocent, and the prosecution did not comment on

the defendant's silence in argument).[6]

In this case, although the State did not directly comment on Mr. Montgomery's post-Miranda silence, it offered a rebuttal case for the sole purpose of impeaching Mr. Montgomery's decision to remain silent after being apprized of his Miranda rights. Prior to the rebuttal testimony, the State proffered that the witness, the lead detective in the case, would testify that nobody had ever contacted him with any alternative explanation as to why Mr. Montgomery had purchased hydrogen peroxide. RP at 203. Mr. Montgomery objected, naming the exercise of his right to silence. RP at 203. The court permitted the testimony and the detective testified according to the proffer. RP at 205.

In its redirect questioning, the State again directly asked the detective about Mr. Montgomery's silence: "And why didn't you ask him any questions?" The detective answered, "It was already made clear to me from him from the previous day [*i.e.*, the day of Mr. Montgomery's arrest] he didn't want to talk to me." RP at 207. The only possible purpose for this question was to elicit a negative inference from Mr. Montgomery's decision not to speak to the detective. The obvious implication of the State's questioning is that an innocent person

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6 Given the holding of *Doyle*, which involved improper questioning but not improper prosecutorial comment, the Washington cases cannot be interpretted to require improper questioning combined with improper comment.

would have spoken to the police at the time of arrest, or at least explained things sooner, before the State took the case to trial.

Like the questioning in *Doyle*, this question was designed to impeach Mr. Montgomery's version of the case on the basis of his failure to offer it sooner. Such impeachment is impermissible under *Doyle*, as it was a violation of Mr. Montgomery's due process right to remain silent.

Moreover, as already discussed, the untainted evidence in this case was not so overwhelming that it necessarily led to a finding of guilt. *See Guloy*, 104 Wn.2d at 426. When the evidence of guilt was not overwhelming, the State's impeachment likely swayed the jury and the State cannot prove beyond a reasonable doubt that a reasonable jury would have reached the same result absent the error. See *Easter*, 130 Wn.2d at 242 (holding when evidence not overwhelming, officer's testimony that defendant was evasive and a "smart drunk," coupled with prosecutorial comment on defendant's pre-arrest silence in closing argument was not harmless). Accordingly, the unconstitutional testimony swayed the jury, prejudiced Mr. Montgomery, and requires reversal.

Point IV: When No Evidence Was Introduced as to a "Missing" Landlord and the Grandson was not an Important Witness, the Missing Witness Instruction and the State's Closing Argument in this Regard Were Inappropriate and Prejudicial

When neither Mr. Montgomery's grandson nor his landlord could properly be considered a missing witness, the trial court erred in giving a missing witness instruction. For the same reasons, the prosecutor's closing argument as to these matters was erroneous and prejudicial. A missing witness instruction on behalf of the State is warranted when a witness is within the control of the defendant, it is clear the defendant was able to produce the witness, the defendant's testimony unequivocally implies that the absent witness could corroborate his theory of the case, and the witness is not unimportant and would not give cumulative testimony. *State v. Blair*, 117 Wn.2d 479, 487-89, 816 P.2d 718 (1991) (discussing prosecutorial comment during closing argument about absent defense witnesses). Here, the State based its request for the instruction on Mr. Montgomery's absent fourteen-year-old grandson and landlord. RP at 211. Neither situation justified the instruction under *Blair*.

First, the instruction was not warranted as to the grandson as he was not an important witnesses and his testimony would have been cumulative. In *Blair*, the Court held that individuals named on slips of paper found in the defendant's room were important, non-cumulative witnesses when the defendant averred that the

individuals owed him money and were not, as the prosecution claimed, drug contacts. For this reason, the Court held that prosecutorial comment about these individual's absence from trial was appropriate. *Blair*, 117 Wn.2d at 482-84 & 489. The Court noted that the importance of a witness's testimony depends on the facts of the case. *Id.* at 489.

In contrast to the absent individuals in *Blair*, the grandson in this case would not have helped Mr. Montgomery's case. He was a minor-aged relative of the defendant, in his care and dependent upon him due to his age and the disability of his father. Had he been called as a witness, his credibility would have been impugned on these very grounds. Accordingly, his testimony would not have furthered Mr. Montgomery's case to any palpable extent. In sum, the grandson was not an important witness and the instruction was inappropriate as to him.

In addition, the grandson's testimony would have been cumulative. Mr. Montgomery provided reasons for purchasing the acetone, hydrogen peroxide, matches and cold medicine. Given the identity of interests that would be presumed between a grandfather and a dependent, minor child, the testimony of Mr. Montgomery's grandson on the same matters would have been merely cumulative.

Next, the absence of the landlord did not justify the instruction when it

was not clear Mr. Montgomery would have been able to produce the witness and his testimony did not unequivocally imply that the landlord could corroborate his theory of the case. The prosecution is required to lay this type of foundation for a person's absence before a missing witness instruction may be given. *See Blair*, 117 Wn.2d at 487-89. In *Blair*, prosecutorial comment about missing witnesses was appropriate when both the defendant and a prosecution witness testified as to the nature of the people named in the "crib sheets." *Blair*, 117 Wn.2d at 482-84. Similarly, in *State v. Contreras*, 57 Wn. App. 471, 476, 788 P.2d 1114 (1990), prosecutorial comment on a missing alibi witness was held to be appropriate when the defendant testified that the individual had testified for him in a previous trial. No similar foundation was laid in this case.

First, no evidence as to Mr. Montgomery's ability to produce this witness was introduced. Unlike the situation in *Contreras*, where the State questioned the defendant about the missing witness, 57 Wn. App. at 473, here, neither the State nor the defense asked any questions about the landlord. In fact, there was no indication that the State viewed the landlord as "missing" until it asked for the jury instruction. See RP.

The only testimony in this regard was that Mr. Montgomery lived in a rented trailer and agreed with the owner that he would "pay the space rent and fix

the trailer up." RP at 167. For all that was before the court, the owner of the trailer might have been a completely unavailable witness at this point. When the State asked no questions about the landlord, the defense was not given a chance to explain the absence. Quite possibly the landlord's absence was as justified as that of Mr. Montgomery's son. Thus, the instruction was not appropriate when it was not clear Mr. Montgomery would have been able to produce the witness.

In addition, the instruction was not appropriate because Mr. Montgomery's testimony did not unequivocally imply that the landlord could corroborate his theory of the case. Mr. Montgomery stated that he needed the acetone to remove glue from tiles needing replacement in his trailer. RP at 179-80. He did not say that the landlord directed him to remove the tiles or that the landlord even knew tiles needed replacing. All the evidence necessarily showed was that the landlord knew the trailer needed to be "fix[ed] . . . up." For all the testimony revealed, the owner of the trailer could have been an absentee landlord who knew nothing about the specific problems needing fixing. Thus, there was absolutely no evidence that the landlord could have corroborated Mr. Montgomery's explanation, except in the most general terms (that Mr. Montgomery lived in the trailer and agreed to fix it up). To the extent the owner could have corroborated the general facts of the rental arrangement, he or she was not an important witness.

Accordingly, the court gave a missing witness instruction regarding the landlord without any foundation for it, creating an unfair surprise for the defense. The first time the defense learned about the "missing" landlord was after both sides had rested. RP at 211. Unlike in *Blair*, where there was considerable testimony about the names on the crib sheets, here, there was only one brief mention that the trailer was owned by a third party. This situation was manifestly unfair to the defendant, who was not given an opportunity to explain the missing landlord during the evidence portion of the trial, and could not explain the absence during closing given the lack of evidence.

For all of these reasons, the trial court erred in giving the missing witness instruction as to both the grandson and the landlord and the instruction prejudiced Mr. Montgomery by shifting the burden of proof, requiring reversal.

Because the missing witness instruction was not warranted, the prosecutor's comments during closing argument regarding "missing" witnesses and Mr. Montgomery's failure to corroborate his testimony were both inappropriate and prejudicial. Indeed, the extent to which the prosecutor emphasized this point reveals that it was a cornerstone of the prosecutor's case. RP at 237, 239, 240, 241-42, 245, 264. For these reasons, the prosecutor's

argument regarding the missing witnesses also requires reversal.[7]

If this Court holds that the missing witness instruction and prosecutorial argument were permissible under *Blair*, then the instruction and argument were improper for other constitutional reasons, namely that they violated Mr. Montgomery's Sixth Amendment rights to confront witnesses (in that the instruction directs and the State argued the inference that the "missing witness" would have given unfavorable testimony), to present witnesses (as missing witness doctrine exists primarily to coerce production of witnesses), and to require the State (without the use of impermissible presumptions) to prove its case. *See* U.S. Const. amend. VI; Edwards, Carl T., *Speak of the Missing Witness, and Surely He Shall Appear: the Missing Witness Doctrine and the Constitutional Rights of Criminal Defendants* -- State v. Blair, *117 Wash. 2d 479, 816 P.2d 718 (1991)* 67 Wash. L. Rev. 691 (1992) (noting that *Blair* did not address all constitutional concerns regarding the instruction and that other concerns limit the instruction's use); *see generally Crawford v. Washington*, 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004) (discussing confrontation clause generally).

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7 Although Mr. Montgomery did not object to this line of argument, he could not have been expected to object as the court had already overruled his objections to the missing witness instruction. Once that instruction was allowed, he had no basis to dispute the prosecutor's argument. Indeed, no curative instruction could have been given in this case, as it would have conflicted with the missing witness instruction. See also Rule of Appellate Procedure 2.5(a)(3).

Point V: The State and Trial Court Shifted the Burden of Proof to the Defendant, Requiring Reversal

In addition to the burden-shifting inherent in the inappropriate missing witness instruction and the consequently inappropriate prosecutorial argument on the same theory, the burden of proof in this case was shifted to the defendant by: 1) The State's questioning regarding the absence of Mr. Montgomery's son and grandson, 2) the State's rebuttal case, and 3) the State's questions to Mr. Montgomery's daughter regarding her failure to provide evidence prior to trial.

The State has the burden of proving every element of the crime beyond a reasonable doubt. *State v. Traweek*, 43 Wn. App. 99, 107, 715 P.2d 1148 (1986) (*citing In re Winship*, 397 U.S. 358, 364, 25 L. Ed. 2d 368, 90 S. Ct. 1068 (1970), *disapproved on other grounds by State v. Blair*, 117 Wn.2d 479, 491, 816 P.2d 718 (1991). The State's demand for an explanation or corroboration from the defendant may impermissibly shift the burden of proof to the defendant, requiring reversal. *See State v. Fleming*, 83 Wn. App. 209, 921 P.2d 1076 (1996) (in rape prosecution, among other errors, State questioned defendants' failure to explain aspects of case, impermissibly shifting burden of proof). Here, while the court and the State both properly instructed the jury on the burden of proof, the combined effect of the cited errors nevertheless resulted in shifting the burden of proof, requiring reversal.

First, when Mr. Montgomery's son and grandson were not important witnesses and their testimony would have been cumulative, the trial court erred in permitting the State to question Mr. Montgomery about their absence. RP at 187-89, 192. Questioning a defendant about missing witnesses is inappropriate when either the witness is unimportant or the testimony would be cumulative. *See Blair*, 117 Wn.2d at 489.

As already discussed, given the familial relationship and living situation, Mr. Montgomery's grandson was an unimportant, cumulative witness. See Point IV, above. Due to his disability, Mr. Montgomery's son was similarly situated to his grandson. Thus, for the same reasons the grandson's testimony would have been unimportant and cumulative, so would the son's have been. For these reasons, the trial court erroneously permitted a shift in the burden of proof when it allowed the State to question Mr. Montgomery, over defense counsel's objections, about the absence of his son and grandson from the trial. See RP at 187-89, 192.

Second, the trial court allowed the State to shift the burden of proof with its rebuttal case. As discussed in Point III, above, the State impermissibly questioned the lead detective about Mr. Montgomery's failure to offer an innocent explanation for his purchases. RP at 204-05, 207. While this questioning was a violation of Mr. Montgomery's right to silence, it also impermissibly shifted the

burden of proof to Mr. Montgomery to prove his innocence.

Third, the State's questioning of Mr. Montgomery's daughter, charging her with failing to come forward to exonerate her father sooner, was also burden-shifting. RP at 198, 199. Indeed, the prosecutor verged on misconduct with his questioning. After being told such questioning was impermissible, the prosecution simply rephrased the question seconds later. RP at 198, 199. Moreover, while the court upheld the objections to the statements, it did not strike them. Thus, the State's statements were allowed to remain in the record without permitting the daughter to offer any explanation. These events also shifted the burden of proof to Mr. Montgomery.

These occurrences, combined with the burden-shifting problems noted in Point IV, above, shifted the burden of proof to Mr. Montgomery to such a degree that appropriate instruction as to the lawful burden of proof could not correct the problem. Accordingly, this Court should reverse his conviction.

Point VI: The Trial Court Erred in Failing to Consider the First-time Offender Waiver Sentencing Option of RCW 9.94A.650

Mr. Montgomery, with no prior felonies on his record, was eligible for the First-time Offender Waiver of RCW 9.94A.650 and the trial court erred in not considering it. This provision, pursuant to which a court may waive a standard range sentence, applies to offenders who have never been previously convicted of

a felony and who are not convicted of certain enumerated crimes, none applicable here. RCW 9.94A.650(1) & (2). Given its evident applicability to Mr. Montgomery, the trial court erred in not considering it and this Court should remand for resentencing with the instruction that the court consider this statute. *See State v. McGill*, 112 Wn. App. 95, 98-100, 47 P.3d 173 (2002) (standard range sentence may be appealed if trial court believes it had no discretion to impose a lower sentence or refused to exercise discretion).

Point VII: Mr. Montgomery's Trial Counsel was Ineffective in Failing to Object to the State's Evidence as to the Ultimate Issue in the Case and in Failing to Inform the Court of the Applicability of RCW 9.94A.650

Mr. Montgomery's State and federal constitutional rights to effective counsel were violated by his attorney's 1) failure to object to the State's witnesses' opinions as to Mr. Montgomery's intent and 2) failure to inform the court of the applicability of RCW 9.94A.650. A defendant's right to counsel includes the right to effective counsel. See U.S. Const. amend. VI; Wash. Const. art. 1 § 22. To demonstrate ineffective assistance of counsel, the defendant must show both that defense counsel's representation fell below an objective standard of reasonableness and that, but for this deficient representation, there is a reasonable probability that the result of the proceeding would have been different. *State v. Reichenbach*, 153 Wn.2d 126, 130, 101 P.3d 80 (2004) (citations

omitted). If defense counsel's conduct can be characterized as legitimate trial strategy or tactics, then it cannot constitute ineffective assistance. *Strickland v. Washington*, 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). In this case, counsel's performance was both deficient and prejudicial and can in no way be viewed as tactical.

First, counsel's performance at trial was deficient when he failed to object to impermissible testimony. See Point II, above. The failure to state an objection on the correct grounds may be a basis for finding ineffective assistance of counsel. *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) (regarding objection to jury instruction). Thus, the failure to state any objection at all when one is required may also be ineffective assistance.

Here, counsel's failure to object was deficient when any competent attorney would have objected to the opinion testimony. It is manifest that witnesses may not testify to the ultimate issue in the case. *Easter*, 130 Wn.2d 228, 242. Such testimony is always inappropriate as it invades the sacred province of the jury. See *id.* Yet, in this case, counsel failed to object as each of the State's witnesses opined that Mr. Montgomery intended to manufacture methamphetamine. In addition, the failure to object could not be construed as tactical when counsel objected to similar testimony at other times in the case. See

RP at 73, 187. Accordingly, counsel's performance was clearly deficient.

Moreover, but-for the deficient performance, Mr. Montgomery would not have been convicted. Had counsel objected to the impermissible testimony, the court would have sustained the objections, as it did when counsel remembered to object. See RP at 73, 187. In addition, the three witnesses' testimony as to their opinions as to Mr. Montgomery's intent was the strongest evidence, arguably the only evidence, of Mr. Montgomery's illicit intent. Accordingly, without the testimony, a conviction would have been impossible. See Points I & II, above. Thus, counsel's deficient performance requires reversal when it prejudiced Mr. Montgomery.

Second, counsel's performance at sentencing was deficient when he failed to inform the court of the applicable law regarding Mr. Montgomery's sentence. *See State v. McGill*, 112 Wn. App. 95, 47 P.3d 173 (2002). In *McGill*, the court indicated that the failure to inform a sentencing court of case law which might justify an exceptional sentence downward merited reversal on ineffective assistance grounds. *Id.* at 101-02; *see also Ermert*, 94 Wn.2d 839; *but see State v. Hernandez-Hernandez*, 104 Wn. App. 263, 15 P.3d 719 (2001) (not ineffective assistance to fail to point out valid ground for departure). In the instant case, the attorney's error is even greater than existed in *McGill*. Here, the attorney failed to

inform the court of a manifestly-applicable statute, not just case law, that permits a sentence outside the standard range, not a downward departure. When the statute provides for incarceration beginning at 90 days, and Mr. Montgomery received a 51-month sentence, the attorney's failure could not have been tactical. For the same reason, the attorney's failure was prejudicial and requires reversal.

For all these reasons, Mr. Montgomery's right to the effective assistance of counsel was violated and this Court should reverse his conviction.

Point VIII: Mr. Montgomery's Conviction Should be Reversed Under the Cumulative Error Doctrine

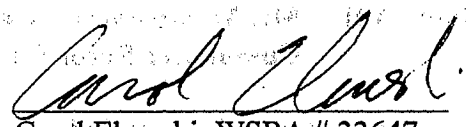
If this Court does not find any of the above-described errors to require reversal individually, this Court should order a reversal as the total effect of the errors deprived Mr. Montgomery of his right to a fair trial. The cumulative error doctrine applies when individual trial errors may not be sufficient to compel a new trial, but taken together, deprived the defendant of a fair trial. See, e.g., *State v. Greiff*, 141 Wn.2d 910, 929, 10 P.3d 390 (2000). Here, the testimony as to the ultimate question in the case, the questioning regarding defendant's post-Miranda silence, the inappropriate missing witness instruction, the prosecutorial argument regarding the missing witness, the several occurrences of burden shifting, and counsel's failure to object to testimony regarding the ultimate issue in the case, taken together, deprived Mr. Montgomery of a fair trial and require reversal.

D. CONCLUSION

For all of these reasons, Virgil R. Montgomery respectfully requests this Court to reverse his conviction and order his case dismissed or, in the alternative, to vacate and remand his sentence for resentencing in accordance with RCW 9.94A.650.

Dated this 14th day of November, 2005.

Respectfully submitted,



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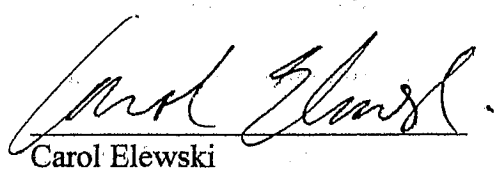
Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that on this 14th day of November, 2005, I mailed one copy of the attached brief, postage prepaid, to the attorney for the Respondent, Kevin Michael Korsmo, Deputy Prosecuting Attorney, 1100 W. Mallon, Spokane, Washington, 99201, and one copy of the brief, postage prepaid, to Mr. Virgil R. Montgomery, DOC No. 882674, C4, E-4-2, Airway Heights Correction Center, P.O. Box 2079, Airway Heights, WA, 99001-2079.



Carol Elewski